UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

THE MATTER OF:	)	Docket No. 10-97-0090-CWA/G
	)	
LARRY RICHNER	)	Proceeding to Assess
NANCY SHEEPBOUWER	)	Class I Administrative
& RICHWAY FARMS,	)	Penalty Under Clean Water
Everson, Washington	)	Act Section 309(g)
	)	33 U.S.C. §1319
RESPONDENTS	)	
	)	

ORDER ON COMPLAINANT'S MOTION FOR RECONSIDERATION

Complainant, Manager of EPA Region 10's NPDES Compliance Unit, filed a Motion dated April 13, 2001, requesting reconsideration of the Initial Decision in the above case. The Complainant argues that "all legal and factual elements of a Clean Water Act violation have been proven in this case and any minor technical defect in EPA's Amended Complaint did not prejudice or disadvantage Respondents." Complainant therefore requests a finding of liability as to Respondents Larry Richner and Richway Farms.[1] The Respondents did not file a response to the Complainant's Motion.

I.

As a preliminary matter, I note that the applicable rules of practice[2] do not provide for motions for reconsideration of an initial decision, as opposed to motions to reopen a hearing to take further evidence. See, 40 C.F.R. Section 22.28. Section 22.51 of the Consolidated Rules of Practice, which specifically applies to the present proceeding, states in relevant part:

[1] At hearing EPA was advised that the correct name of the dairy business is Rickway Farms; however, the pleadings have referred to that Respondent as Richway Farms.

[2] The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

> . . . The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

The Complainant appealed the February 15, 2001 Initial Decision in this matter to the Environmental Appeals Board ("EAB") on March 19, 2001.

In contrast, Section 22.32 of the Consolidated Rules of Practice authorizes motions for reconsideration of final orders issued by the Environmental Appeals Board. The review of motions for reconsideration before the EAB has been limited to situations involving changes in the controlling law, new evidence, or the need to correct a clear error or to prevent manifest injustice. See Southern Timber Products, Inc., 3 EAD 880, 888-890 (CJO, 1992). As noted by the Chief Judicial Officer,

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

Southern Timber Products, supra, at 889 (quoting In re City of Detroit, TSCA Appeal No. 89-5, at 2 (CJO, Feb. 20, 1991)).

Assuming that a motion for reconsideration of an initial decision issued by a Presiding Officer is proper under the Consolidated Rules of Practice, such a motion would be subject to the same standard of review as a motion for reconsideration of a final order by the EAB. Rogers Corporation, (EPA Docket No. TSCA-I-94-1079) (December 18, 1997). Since the Complainant does not argue that there has been a change in controlling law and does not present new evidence, the relevant standard of review for the present Motion is "the need to correct a clear error or to prevent manifest injustice."

II.

Complainant makes four arguments in support of its motion for reconsideration:

(1) Complainant's first argument is that the discharge of manure into the creeks on the Richway Farms property observed by

EPA inspectors on the day of the inspection is a violation of the Clean Water Act even if no water from the creeks was shown to have flowed off the property to the Nooksack River, and that Respondents should be held liable for this violation.[3]

Complainant's argument was addressed and rejected in Section IV E of the Initial Decision. As explained there, my reading of the Amended Complaint is that it charged Respondents with the discharge of pollutants into the Nooksack River, not into creeks on the farm property. Under Section 22.24(a) of the Consolidated Rules of Practice, the Complainant has the burden of proving the specific allegations in the complaint:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.

40 C.F.R. 22.24(a) (1999). (Emphasis added)

The initial decision held that the Complainant had failed to meet its burden under Section 22.24.[4] The Consolidated Rules of Practice do not allow the Complainant to prove a different violation than that alleged in the Complaint, absent a timely amendment to the Complaint pursuant to Section 22.14(c).

Complainant's appeal of the Initial Order to the

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[3]In making this argument, Complainant states that

> The initial decision determined that the unnamed creeks on the Richway Farms property are tributaries of Smith Creek and the Nooksack River.

No determination was made on this issue. Footnote 11 on page 14 of the Initial Decision, which Complainant cites in support of its assertion, states in relevant part only that:

> Both creeks on the property appear to be tributaries of Smith Creek and the Nooksack River.

[4] A railroad embankment separates the Richway Farms dairy property from the Nooksack River. The Complainant failed to show by a preponderance of the evidence that the culvert under the railroad embankment was open so that water could pass through it to the Nooksack River. Findings of Fact and Conclusions of Law No. 40.

Environmental Appeals Board includes this issue,[5] which is more appropriately left for decision by the Board when it considers the Complainant's appeal.

(2) Complainant's second argument, citing the legislative history of the Clean Water Act, is that a discharge of pollutants need not enter waters of the United States on the day of discharge in order to be a violation of the Clean Water Act. Complainant argues further that the railroad culvert connecting the creeks on the farm property to the Nooksack River was opened approximately two weeks after the EPA inspection, that pathogens in dairy waste are able to survive for long periods of time in surface water, and that consequently pollutants observed by the EPA inspectors in the creeks on the property were discharged to the Nooksack River in violation of the Clean Water Act when the culvert was opened after the EPA inspection.

Complainant's argument is apparently directed at the following statements on page 17 of the Initial Decision:

> I find that the Complainant has failed to show by a preponderance of the evidence that the railroad culvert in the embankment running along the southwest side of the dairy farm at 3909 Hoff Road was at least partially open at the time of the EPA inspection on March 13, 1997. The Complainant has therefore also failed to show that at the approximate time of the inspection there was a discharge to the Nooksack River from creeks on the property at 3909 Hoff Road.

The corresponding finding in the Findings of Fact and Conclusions of Law is No. 40, which states as follows:

> (40) It has not been shown by a preponderance of the evidence that as of the date of the March 13, 1997, inspection the culvert under the railroad embankment was open so that water could pass through it from the property at 3909 Hoff Road to Smith Creek and the Nooksack River.

It is evident from Complainant's argument that the statements quoted above from the Initial Decision are susceptible of being misread. Neither statement was intended to imply that pollutants observed in the creeks on the farm property by EPA inspectors on March 13, 1997, had necessarily to enter the

[5] See Complainant's Appellate Brief at pp. 7-8

Nooksack River on that same day in order for there to be a violation of the Clean Water Act. Of the two statements, the language quoted from page 17 of the Initial Decision captures most clearly the intended determination: that the Complainant failed to show that the culvert was at least partially open on the date of the inspection so that the observed pollutants could pass through it to the Nooksack River, and that the other evidence offered by the Complainant, for example evidence concerning the railroad's culvert maintenance policy discussed on page 17 of the Initial Decision, also failed to show that the culvert was open at the approximate time of the inspection so that contamination from the creeks on the property could discharge to the Nooksack River.

In order to avoid confusion to the parties and to avoid potential erroneous interpretations of the decision, Findings of Fact and Conclusions of Law No. 40 will be amended to read as follows:

> (40) It has not been shown by a preponderance of the evidence that as of the approximate time of the March 13, 1997, inspection the culvert under the railroad embankment was open so that contaminated water could pass through it from the property at 3909 Hoff Road to Smith Creek and the Nooksack River.

This leaves unaddressed the rest of the Complainant's argument - - that the culvert connecting the creeks on the farm property to the Nooksack River was opened by a railroad crew approximately two weeks after the EPA inspection, that pathogens commonly found in dairy waste are able to survive for long periods of time in surface water, and that consequently pollutants observed by the EPA inspectors in the creeks on the property on March 13, 1997 were ultimately discharged to the Nooksack River about two weeks later in violation of the Clean Water Act.

It should be noted that the Complainant did not make this argument at hearing nor in its posthearing brief. At least so far as I am aware, the Complainant never offered this theory of the case until it filed its appellate brief with the Environmental Appeals Board. Perhaps because the Complainant did not make this theory of the case known, certain facts that would be relevant to Complainant's theory were not fully developed in the hearing or in the parties' post-hearing submissions.

For example, EPA's expert on microbiology testified generally concerning the persistence of certain pathogens that

may be found in dairy waste, Tr. pp. 91-2, 94, but EPA did not elicit testimony from her on whether, in the specific physical setting of the Richner property, pathogens from the manure observed by the EPA inspectors on March 13, 1997, would be likely to flow off the property to the Nooksack River at the time the culvert was later opened.

Similarly, although Respondent Larry Richner referred in his testimony to post-inspection efforts to clean up the effects of the landslide that caused the overflow of manure from the dairy operation that was observed by the EPA inspectors, Tr. pp. 102 and 120, he did not testify specifically as to when or how the manure observed by the EPA inspectors may have been cleaned up.

Consequently, the record developed at hearing does not compel a finding that pathogens from the contamination observed by the EPA inspectors on March 13, 1997, would be likely flow off the property to the Nooksack River at the time the culvert was later opened. Such a finding would require both (1) that I apply general testimony on the persistence of cryptosporidium and E. coli to the specific situation at the Richway Farms property in March and April, 1997, and (2) that I assume the Respondents took no action to ameliorate the situation prior to the opening of the railroad culvert, or assume that any actions they took were insufficient to eliminate any flow of pollutants from the property to the Nooksack River once the culvert was opened. No determination was made on these issues in the Initial Decision.

If I were to apply the standard cited by Complainant for deciding motions for reconsideration pending before the EAB, the above facts do not show "the need to correct a clear error or to prevent manifest injustice."

Complainant's appeal of the Initial Order to the Environmental Appeals Board includes this issue,[6] which is more appropriately left for decision by the Board when it considers the Complainant's appeal.

(3) Complainant's third argument is that microscopic pollutants do not require a free flow of water in order to pass through a partially obstructed thirty-inch culvert, and that it is "extremely likely" that the culvert was partially, rather than completely, obstructed at the time of the EPA inspection on March 13, 1997.

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[6] See Complainant's Appellate Brief at pp. 8-11.

The Complainant bases its argument on the testimony of Brian Bragar, a railroad maintenance employee, who testified that the railroad uses pumps to "blow out" culverts when they are plugged, but uses cranes to clear debris out of culverts. Tr. p. 50. The Complainant argues that

> [t]he record shows that a crane, not a pump, was used to clear the culvert in this case two weeks after EPA's inspection. In view of these facts, it is extremely likely that the culvert was sufficiently open for the passage of microscopic contaminants at the time of the EPA inspection.

However, the record in this proceeding is not as clear as the Complainant asserts. In the first place, the record shows that the culvert was cleaned out with a crane and an auger, Findings of Fact and Conclusions of Law No. 38, not with a crane alone. Mr. Bregar's testimony does not explain the significance of using an auger in conjunction with a crane, but one possible inference is that the culvert was blocked to such a degree that use of a crane alone would be insufficient.[7] In any event, the Complainant's argument oversimplifies the crane/pump distinction by failing to explain the significance of using an auger in conjunction with a crane.

As noted in the Initial Decision at page 17, the railroad apparently keeps no log of the maintenance done on culverts; Mr. Bragar's testimony at hearing was vague and tended to prove that the railroad's actual practice was different from its written policy on culvert maintenance; Mr Bragar had only a general recollection of the location of the culvert and did not recall when it had been cleaned last; and from his testimony it was unclear which unit of the railroad is responsible for cleaning the culvert. Tr. pp. 49-52 and 112. In addition, it is not clear that Mr. Bragar was always testifying from personal knowledge:

> Q [By the Complainant's attornery to Mr. Bragar] Have you pulled debris out of culverts in this area?
> . . .
> A There again personally I haven't. I don't run the cranes. I run a front end loader. I run the machinery too. But the crane operators are the ones that actually do that. And I might have been with them

[7] Mr. Richner testified that the culvert was blocked primarily with mud rather than debris. Tr. p. 132.

because I do go help.
Q Mr. Snyder - -
A He is actually the crane operator.

Tr. p. 50. Mr. Snyder, the railroad employee referred to, was present at the hearing but, unexplainedly, the Complainant did not call him to testify.

Thus, contrary to the Complainant's assertion, the record in this proceeding does not show that it is "extremely likely," or even more likely than not, that the culvert was sufficiently open for the passage of microscopic contaminants at the time of the EPA inspection.

In addition, Findings of Fact and Conclusions of Law No. 38 finds that

> The culvert under the railroad embankment was cleared by Burlington Northern Santa Fe Railroad employees approximately two weeks after the March 13, 1997 EPA inspection with the use of a crane and an auger. The standing water on the west side of the tracks rushed toward the northeast side of the tracks until water levels on the two sides of the embankment were balanced out. (emphasis added)

Thus, even if the plugged culvert was not completely watertight at the approximate time of the EPA inspection, the evidence tends to show that any seepage of water through the plugged culvert during the flooded conditions observed by the inspectors or that prevailed at the time the railroad employees cleared the culvert would most likely have occurred in the direction of the Richway Farms property, which is the direction away from the Nooksack River.

If I were to apply the standard cited by Complainant for deciding motions for reconsideration pending before the EAB, the Complainant's argument does not show "the need to correct a clear error or to prevent manifest injustice."

Complainant's appeal of the Initial Order to the Environmental Appeals Board includes this issue,[8] which is more appropriately left for decision by the Board when it considers the Complainant's appeal.

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[8] See Complainant's Appellate Brief at pp. 12-13.

(4) Complainant's fourth argument is that technical defects in pleadings should not prevent a disposition on the merits.

While the Complainant does not specify the "technical defects" at issue, Complainant is presumably referring to Allegations 2.3 and 2.4 of the Amended Complaint, which in the opinion of the Presiding Officer[9] allege a violation in which contaminants originating in a manure pile in the south pasture of the Richway Farms property discharged to the Nooksack River, as opposed to a violation involving the unnamed creeks on the property without a discharge off the property.

Complainant's appeal of the Initial Order to the Environmental Appeals Board includes this issue,[10] which is more appropriately left for decision by the Board when it considers the Complainant's appeal.

III.

IT IS HEREBY ORDERED THAT: The Complainant's Motion for Reconsideration is denied, except as to Findings of Fact and Conclusions of Law No. 40, which is amended to read as follows:

> (40) It has not been shown by a proponderance of the evidence that as of the approximate time of the March 13, 1997, inspection the culvert under the railroad embankment was open so that contaminated water could pass through it from the property at 3909 Hoff Road to Smith Creek and the Nooksack River.

Dated: July 19, 2001

____/S/_____
Steven W. Anderson
Presiding Officer

[9]See the discussion at pages 13-15 of the Initial Decision.

[10]See Complainant's Appellate Brief at pp. 13-16